

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TINA BARR

Claimant

VS.

SWIFT-ECKRICH

Self-Insured Respondent

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Docket No. 259,097

ORDER

Respondent requested review of the March 9, 2006 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on July 6, 2006.

APPEARANCES

James E. Martin, of Overland Park, Kansas, appeared for the claimant. Mark E. Kolich, of Lenexa, Kansas, appeared for respondent, a qualified self insured.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. As noted in the parties' stipulation, this claim involves only a functional impairment claim. Work disability, under K.S.A. 44-510e(a), is not at issue. And at oral argument, respondent's counsel announced that it no longer disputes that claimant sustained an accidental injury arising out of or in the course of her employment.

ISSUES

The ALJ concluded that while the claimant's "alleged injury does [not] meet the criteria for an occupational disease"¹, he nonetheless found that claimant established that her job repeatedly exposed her to a substance which aggravated or accelerated her

¹ The sentence quoted above failed to contain the word "not", but at oral argument, the parties agreed that based upon the context of the entire paragraph, this was a typographical error. The ALJ concluded claimant's injury did *not* meet the criteria for an occupational disease and that the sentence should have read as quoted above with the word "not" inserted in the appropriate place.

asthma.² He went on to award her a 10 percent permanent partial impairment to the body as a whole based upon the opinions expressed by Dr. Gerald Kerby, as well as reimbursement of certain outstanding medical expenses.

The respondent requests review of this decision alleging the ALJ erred in granting claimant a permanent impairment as it contends the greater weight of the evidence suggests claimant's work activities did not permanently impact or worsen her underlying asthmatic condition. And respondent also contends there is an insufficient basis upon which to order it to reimburse claimant's medical expenses as there is no evidence they were incurred as a result of occupational exposure rather than the normal course of her asthmatic condition.

Claimant argues the ALJ's Award should be affirmed in all respects.

The issues to be decided are as follows:

1. Whether claimant sustained a permanent partial impairment as a result of her accidental injury; and
2. Whether claimant is entitled to reimbursement for her out-of-pocket medical expenses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ set out the facts relative to claimant's alleged accident and/or occupational disease and the Board adopts that statement as its own. Highly summarized, claimant maintains she was repetitively exposed to citric acid, a substance that she alleges aggravated and accelerated her asthmatic condition. According to claimant, this exposure began in 1996 and continued to either February or April 2001, when she last worked for respondent. Since leaving respondent's employ, claimant has had no further breathing problems.

The record includes the testimony and opinions of two physicians, and their opinions are, not surprisingly, inconsistent with one another. Claimant's family physician, Dr. Bruce Williams, testified as to the onset of claimant's condition in 1996. According to him, he saw claimant when she first began to notice a shortness of breath following a family vacation. After some pulmonary tests, he concluded she was suffering from a severe obstructive defect and restrictive airway disease, more commonly known as adult onset asthma. As he treated her over the years and up to 2000, he spoke to her about the possible cause

² ALJ Award (Mar. 9, 2006) at 4.

for her respiratory problems and he concluded her episodes always seemed to be connected to a return to her work environment.

Dr. Williams testified that he has no definitive evidence that citric acid *caused* claimant's asthma and in fact, he testified that he was unaware if citric acid is something that people are generally exposed to every day. He was only able to state that occupational exposure to citric acid "could" exacerbate her condition.³

Dr. Gerald Kerby also testified in this matter. Dr. Kerby is a pulmonary disease specialist and he saw claimant in January 2001. He took a history from claimant and while she indicated a relationship between the respondent's use of citric acid in the plant near where claimant worked, Dr. Kerby was unable to link her asthmatic flare-ups to that substance. He noted that when claimant has had an increase in symptoms and presented to the emergency room, those visits appear to have been caused by acute lower respiratory infections and occupational exposure was not listed as a precipitating factor.⁴ In fact, he testified that the most common scenario of adult onset asthma is following some sort of acute lower respiratory infection.⁵ Indeed, that is the history reported by claimant back in 1996 when she was first diagnosed by Dr. Williams.

However, Dr. Kerby does agree that claimant seemed to suffer from a transient worsening of her asthma when she is exposed to irritants and citric acid would be, in his view, considered such an irritant.⁶ Nonetheless, he doubted that citric acid probably changed the course of her asthma.⁷ Dr. Kerby did offer an impairment rating of 10 percent permanent partial impairment to the whole body based upon his evaluation of claimant and her condition at the time of the evaluation. But his testimony does not support claimant's contention that her work-related exposure permanently worsened her asthma.

The burden of proof is upon the claimant to establish his right to an award and must be established by a preponderance of the credible evidence.⁸ It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony, along with the testimony of the claimant, and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence presented in the case and has the responsibility of making its own determination.⁹

³ Williams Depo. at 30.

⁴ Kerby Depo. at 6-7.

⁵ *Id.* at 12.

⁶ *Id.* at 7.

⁷ *Id.* at 8.

⁸ *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

⁹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The Board recognizes the principle that in a workers compensation case medical testimony is not essential to the establishment of a worker's disability.¹⁰ The Board finds, however, that while expert medical testimony is not essential, in this case it is an important factor in determining whether claimant's symptoms and resulting condition had a causal relationship to her work. Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to each case.¹¹

The ALJ then concluded that claimant did establish that claimant's job conditions aggravated or accelerated her asthma. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.¹² The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.¹³

The Board has considered the parties' arguments and disagrees with the ALJ's finding. The Board concludes, based on the record as a whole, that the claimant has failed to meet her burden of establishing that her workplace exposure to citric acid aggravated, accelerated or intensified her asthmatic condition and left her with a permanent worsening. It appears undisputed, at least from this evidence, that claimant associates her episodes of respiratory problems with exposure to citric acid while at work. Dr. Kerby could not confirm this connection and he testified that her flare ups occurred in connection with acute lower respiratory infections rather than some occupational source. And even at that, those flare-ups, whether due to citric acid or any other irritant, resulted in a transient worsening of her asthmatic condition. He did not believe her condition was permanently worsened.

Claimant argues that she did not have asthma until she was exposed to citric acid in the workplace and that her transient flare-ups continue to occur and are, therefore, permanent and she should be compensated. The difficulty with that argument is that no one with medical training has testified that the citric acid *caused* claimant's asthma. To the contrary, asthma is an ordinary disease of life. Rather, it is the periodic flare-ups that she contends worsened her asthma. But it appears that while working for respondent claimant did not have routine flare-ups due to the citric acid. She would have a periodic onset of symptoms and according to Dr. Kerby, these occurred in connection with lower respiratory infections. But there is no evidence of a permanent worsening of her underlying asthma. Claimant has not worked for respondent for a number of years and according to the record,

¹⁰ See *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 201, 547 P.2d 751 (1976).

¹¹ *Newman v. Bennett*, 212 Kan. 562, 568, 512 P.2d 497 (1973).

¹² *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

¹³ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

she continues to use inhalers and to periodically require medications. Based upon this record, the Board is unpersuaded that claimant has established any permanency as a result of the aggravations to her asthmatic condition. Thus, the ALJ's finding with respect to 10 percent permanent partial impairment to the whole body is reversed.

For the same reasons and rationale, the Board also finds that the medical bills incurred in connection with her asthma are not respondent's responsibility. Thus, respondent is not responsible for those expenses, nor required to reimburse claimant.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth Hursh dated March 9, 2006 is reversed and claimant is denied an award of compensation as against respondent.

The costs associated with this claim and as identified in the Award are, nonetheless, assessed against the respondent.

IT IS SO ORDERED.

Dated this _____ day of August, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director